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No. 99-579

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IN THE

Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

Petitioners,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Of Counsel:

Susan R. Lichtenstein
Senior Vice President and
General Counsel
AMERITECH CORPORATION
225 West Randolph
Chicago, Illinois 60606
(312) 750-5200

Patricia J. Winter
Counsel
AMERITECH CORPORATION
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5556

Robert A. Long, Jr.
Counsel of Record
John M. Vine
Michael R. Bergmann
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Charles C. Jackson
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Counsel for Petitioners

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AMENDMENT TO RULE 29.6 STATEMENT

Petitioner Ameritech Corporation recently became a wholly-owned subsidiary of SBC Communications Inc., a publicly-traded corporation. In all other respects, the Rule 29.6 statement filed with the Petition for a Writ of Certiorari remains current. *See* Pet. ii.

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REPLY BRIEF FOR PETITIONERS

Respondents Salomon Brothers Inc and Salomon Brothers Realty Corp. ("Salomon") acknowledge the existence of a square circuit conflict on the question presented for review. Br. in Opp. 1. Salomon does not dispute that this case presents the question on which the circuits are divided. *See* Pet. App. 13a n.1 ("[T]his opinion creates a circuit split."). Nor does Salomon dispute that the question is an important one that merits the attention of this Court. *See generally Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 160 (1993) ("Congress's goal was to bar categorically a transaction that was likely to injure the pension plan.").

There are strong arguments in favor of resolving the circuit split now rather than later. While the split persists, non-fiduciary parties in interest that engage in prohibited transactions will be subject to suit in some areas of the country, but not in others. The situation created by the Seventh Circuit's decision is unfair to both plaintiffs and defendants, and creates serious practical difficulties for employee benefit plans with nationwide operations. The issue has been thoroughly explored in numerous lower court decisions, *see* Pet. 11-16, and twice addressed by this Court in dicta, *see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253-54 & n.4, 262 (1993); *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996). Several entities that support Salomon's position on the merits have filed a brief as *amici curiae* in support of the Petition, explaining that "[t]his Court's intervention is urgently needed" to resolve the circuit conflict. *See* Brief of The American Council of Life Insurance, *et al.* 8.

In short, this case clearly presents an important question on which the circuits are split, and there is no reason to delay resolution of the circuit split. The petition should be granted.

1. This Case Is An Appropriate Vehicle For Resolving The Circuit Split.

Salomon contends (Br. in Opp. 5-14) that this case is not a suitable vehicle for resolving the circuit split. That is not so.

a. There Is No Reason To Delay Resolving The Circuit Split In Order To Wait For A Case Presenting An Issue On Which There Is No Circuit Split.

Salomon contends (Br. in Opp. 5-10) that the Court should delay resolution of the circuit split to await a case presenting a question that has not split the circuits, namely, whether a non-fiduciary party in interest may be held liable for assisting a fiduciary in violating the fiduciary's obligations under ERISA. In Salomon's view, the Court should await a case presenting this "participation-in-fiduciary-breach" theory of liability because that theory "may be the only even potentially viable grounds for imposing liability on a nonfiduciary party-in-interest that enters into a § 1106 prohibited transaction." Br. in Opp. 8.

Salomon's argument assumes an answer to the question on which the circuits are divided. Six courts of appeals have held that a claim against a non-fiduciary party in interest that engages in a prohibited transaction is not only "potentially viable," but is *actually* viable. See Pet. 9-10. In addition, this Court has twice addressed in dicta claims against non-fiduciary parties in interest, and has recognized the potential viability of such claims.[1]

In contrast, no court of appeals has held that a non-fiduciary party in interest may be sued under ERISA for assisting a fiduciary in breaching the fiduciary's obligations, and this Court has

[1] *See Mertens*, 508 U.S. at 253-54 & n.4, 262; *Lockheed*, 517 U.S. at 889 n.3. Salomon asserts (Br. in Opp. 8) that a claim against a non-fiduciary party in interest that engages in a prohibited transaction is not viable after *Lockheed*. But *Lockheed*'s footnote 3 reconciles the holding in that case with dicta in *Mertens* suggesting that ERISA § 406(a), 29 U.S.C. § 1106(a), imposes obligations on non-fiduciary parties in interest. In addition, at least two courts of appeals have held that *Lockheed* does not preclude claims against non-fiduciary parties in interest. *LeBlanc v. Cahill*, 153 F.2d 134, 152 (4th Cir. 1998); *Herman v. South Carolina National Bank*, 140 F.3d 1413, 1422 n.14 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999).

suggested in dicta that such a claim is not available. *See Mertens*, 508 U.S. at 253-55 & n.5. A question that has created no disagreement among the courts of appeals generally does not merit review by this Court. And the Court typically does not defer resolution of important circuit conflicts until it can take up other issues that have not divided the courts of appeals.

Having asserted that the Court should await a case that presents both a "direct" liability theory and a "participation-in-fiduciary-breach" theory, Salomon then argues that a "direct" theory ultimately is no different from a "participation" theory. *See* Br. in Opp. 9 (arguing that, if the fiduciary caused the violation, it follows that the non-fiduciary party in interest assisted the fiduciary in breaching the fiduciary's obligations). Again, this is an argument on the merits rather than an argument about whether review should be granted. If Salomon is correct, moreover, its argument that the Court should await a case presenting a "participation" theory of liability makes no sense, because a "direct" theory and a "participation" theory are really one and the same.[2]

b. There Is No Reason To Prolong The Circuit Split Pending Final Resolution Of Ameritech's Other Claims.

Salomon contends (Br. in Opp. 10-11) that the Court should deny review because the Seventh Circuit's decision, while definitively rejecting Petitioner Ameritech's claim that a non-fiduciary party in interest that engages in a prohibited transaction

[2] The question presented by the Petition ("Whether a non-fiduciary party in interest . . . that engages in a prohibited transaction . . . with the plan can be sued under ERISA . . . for 'appropriate equitable relief,' including restitution." Pet. i.), fairly includes the question whether a non-fiduciary party in interest may be sued because, by engaging in a prohibited transaction, it assists a fiduciary in violating the fiduciary's own obligations under ERISA. That issue was also fairly included within the question framed by Salomon and certified to the Seventh Circuit: "Does 29 U.S.C. § 1132(a)(3) affirmatively authorize a private right of action against a nonfiduciary party-in-interest who participated in a transaction with a pension plan prohibited by 29 U.S.C. § 1106(a)." Pet. App. 63a.

can be sued under ERISA, does not foreclose the possibility that Salomon might ultimately be held liable as a fiduciary under ERISA or under state law.[3]

The fact that the court of appeals' decision does not finally resolve Ameritech's other claims does not make this case an unsuitable vehicle for resolving the circuit split. This Court will grant review of a nonfinal decision where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993) (citing cases); *see also id.* at 197 (citing examples of cases in which "[c]ertiorari was . . . issued to review a nonfinal judgment where there was a conflict on a question of law . . . which would justify review of a final decree or judgment").

This case easily meets that standard. It presents an important and clear-cut issue of law on which the circuits are cleanly divided. The issue is fundamental to the further conduct of the case, and otherwise qualifies as a basis for certiorari.[4] There are strong reasons favoring an early resolution of the circuit conflict. The Seventh Circuit's decision is a final rejection of Petitioners' claim, and further proceedings on Petitioners' remaining claims are quite unlikely to shed any additional useful light on the question presented for review. Accordingly, the remaining claims do not justify delaying resolution of the circuit conflict. *See, e.g.*, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (granting review after the court of appeals held, on certification under 28 U.S.C. § 1292(b), that state-law remedies applied in a maritime wrongful death case); *Wilson v. Garcia*, 471 U.S. 261, 264-66 (1985) (granting review to resolve a circuit conflict after the court of appeals held, on certification under § 1292(b), that a

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[3] These additional claims have already been rejected by the district court, and Salomon takes the position that Ameritech cannot appeal any claims that Salomon is liable as a fiduciary. Br. in Opp. 10 n.4.

[4] When Salomon sought certification under 28 U.S.C. § 1292(b), it asserted, and the district court agreed, that the issue is a "controlling" question of "law." *See* Pet. App. 63a.

claim under 42 U.S.C. § 1983 was not time-barred); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 643-44 (1980) (*per curiam*) (granting review after court of appeals held, on certification under § 1292(b), that challenged practice was not *per se* illegal).

c. There Is Ample Evidence In The Record That Salomon Knew Or Should Have Known That It Was Engaging In Prohibited Transactions.

There is no merit to Salomon's argument (Br. in Opp. 11-14) that review should be denied because, assuming that a non-fiduciary party in interest may be sued under ERISA for engaging in a prohibited transaction, the plaintiff must prove that the defendant "knew at the time of the transaction that the fiduciary who caused the plan to engage in the transaction was violating § 1106(a)." Br. in Opp. 11. According to Salomon (*id.* at 12), such knowledge "must" be an element of a claim under § 406 of ERISA, 29 U.S.C. § 1106, and Ameritech failed to present any admissible evidence that Salomon knew at the time of the transaction that a fiduciary was violating § 406.

There are several flaws in this argument. First, Salomon is incorrect in asserting (Br. in Opp. 12) that actual knowledge of a violation "must be an element of any § 1106(a) claim against a nonfiduciary party-in-interest." By its terms, § 1106(a) bars transactions if the fiduciary "knows *or should know*" that it is dealing with a party in interest. ERISA § 406(a), 29 U.S.C. § 1106(a) (emphasis added). That is not, as Salomon claims (Br. in Opp. 12) an "express scienter standard" (*i.e.*, a requirement that the defendant knowingly violated the law): "'Knew' and 'did not know but should have known' are different. One refers to actual and the other to imputed knowledge." *Contract Courier Services, Inc. v. Research and Special Programs Administration, United States Department of Transportation*, 924 F.2d 112, 113-14 (7th Cir. 1991). Of the half dozen courts of appeals that have held that a non-fiduciary party in interest may be sued under ERISA for engaging in a prohibited transaction, not one has held that the plaintiff must show that the defendant knew the transaction violated § 406. Indeed, the only court of appeals to have expressly addressed the issue held (in the context of a party in interest who did not pay value for the plan assets received) that liability is *not*

limited "to parties in interest who *knowingly* receive Plan assets to which they are not entitled." *See Landwehr v. DuPree*, 72 F.3d 726, 734 (9th Cir. 1995).[5]

Second, there is ample evidence in this record that Salomon satisfied any applicable "knowledge" requirement. As the district court stated, "knowledge that [Salomon] was a service provider to an employee pension benefit plan and was engaging in a transfer of property with the plan or its fiduciary is enough." Pet. App. 42a. Salomon knew that: (1) it provided services to the Ameritech Pension Trust; (2) it retained an interest in three of the four "Fee Agreements" that it sold to the Pension Trust; (3) it agreed to provide information on an ongoing basis to the Pension Trust's investment manager, NISA; (4) NISA was an ERISA fiduciary; and (5) NISA was purchasing the Fee Agreements on behalf of the Pension Trust. *See* C.A. Supp. App. 95-104, 108-09, 250, 381-84, 481-86. In addition, there is no dispute that NISA was an ERISA fiduciary and caused the plans to enter into the prohibited transactions. Thus, Salomon is not entitled to summary judgment on an alternative ground.[6]

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[5] Salomon cites ERISA § 405, 29 U.S.C. § 1105, which provides that co-fiduciaries who participate in transactions caused by another fiduciary may be liable if they "know" that an act or omission by the other fiduciary is a breach. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1). But liability under § 406 is not the same as liability under § 405, and the prohibitions of § 405 are "[i]n addition to any liability . . . under any other provision of this part." ERISA § 405(a), 29 U.S.C. § 1105(a). Moreover, courts of appeals have recognized that a non-fiduciary party in interest that engages in a prohibited transaction is liable for its *own* wrongdoing. *See, e.g., Landwehr*, 72 F.3d at 734. This undermines Salomon's attempted analogy to co-fiduciary liability under § 405, as well as its assertion that the relevant knowledge (if any is required) is knowledge of a fiduciary's violation, rather than knowledge of the defendant's own violation.

[6] Salomon suggests (Br. in Opp. 11) that the Court will be required to define the elements of a claim against non-fiduciary parties in interest if it grants review and holds that such a claim is available under ERISA. That is not so. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. R. 14.1(a); *see also Yee*

(...footnote continued)

2. There Is No Reason To Prolong The Circuit Split To Await Further Consideration Of The Issue By The Courts Of Appeals.

Salomon contends (Br. in Opp. 14-16) that it is appropriate to delay resolution of the circuit split to await further consideration of the issue by the courts of appeals. There is no basis for that suggestion. The Seventh Circuit's decision creates a clear circuit split on an important issue that will not be resolved without this Court's intervention. The Seventh Circuit polled its members, and declined to take the case *en banc* despite its express recognition that the panel's decision creates a circuit split. *See* Pet. App. 13a n.1. The six other circuits that have already decided the issue are unlikely to vote to reconsider it *en banc*; certainly all six will not do so.

Salomon's assertion (Br. in Opp. 16) that there is no "urgency" about resolving the split is flatly incorrect. *See Amici* Br. 8 (review is "urgently needed"). As long as the circuit split persists, plaintiffs in some circuits will be able to sue non-fiduciary parties in interest that engage in prohibited transactions under ERISA, while plaintiffs in the Seventh Circuit will not. This disparity on a basic and important issue of ERISA law is unfair to all parties concerned, and creates severe practical problems for plans with nationwide operations. Although the Court has denied certiorari in prior cases (Br. in Opp. 16), those cases came to the Court at a time when there was no circuit split. *See Fickling v. Herman*, 119 S. Ct. 1030 (1999); *Stangl v. Reich*, 519 U.S. 807 (1996).

(. . . continued)

v. City of Escondido, 503 U.S. 519, 535 (1992). The "knowledge" issue was not reached by the court of appeals, and has created no conflict in the circuits. In those circumstances, the Court may exercise its discretion to allow the lower courts to consider the issue in the first instance. *Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) ("[W]hen the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court."); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (declining to decide scienter issue not reached by the court of appeals).

The issue presented by this case has been extensively explored in numerous lower court decisions, and "further review . . . is unlikely to provide greater insight into the issue." *Amici* Br. 9. Contrary to Salomon's contention, there is no need for this Court to await additional court of appeals' opinions that specifically discuss the significance of a "recommendation" by congressional "staff." Br. in Opp. 15. Similarly, the Court need not answer the question whether knowledge is an element of an action against a non-fiduciary party in interest, let alone determine the level of knowledge that is required. And Salomon's suggestion (*id.*) that the Court should refuse to resolve the circuit split until the courts of appeals that recognize a cause of action say more about the "precise[] . . . operative theory" of liability makes little sense. Six courts of appeals have held that non-fiduciary parties in interest *are* liable, and have given their reasons for doing so. Unless those courts vote to reconsider the issue *en banc*, there is no reason for them to say more.

3. The Question Presented Is Important And Warrants This Court's Attention.

Salomon attempts to deflect the Court's attention from the importance of the legal issue presented by focusing on particular features of this case, such as the fact that the Ameritech plans are defined benefit plans (under which Ameritech is obligated to pay fixed benefits regardless of the plans' investment performance), and the fact that Ameritech is financially able to compensate the plans for their losses. Br. in Opp. 16-17. This ignores the fact that the Seventh Circuit's holding applies to all non-fiduciary parties in interest that engage in prohibited transactions under ERISA. Many plans covered by ERISA are not defined benefit plans, and not all ERISA employers and plan fiduciaries are solvent. Moreover, even where employees will not lose benefits at the end of the day, the question remains whether victimized plans or their beneficiaries can sue parties in interest who profit from prohibited transactions seeking restitution of the ill-gotten gains.

Salomon also points to other possible remedies, including claims under ERISA against fiduciaries and co-fiduciaries, "potential[]" claims against other persons under other federal laws or state laws, and possible enforcement actions by the Department

of Labor (in some cases) or excise taxes (in other cases). Br. in Opp. 17. But these remedies may not work. Fiduciaries may be insolvent; claims under other laws may be barred under ERISA's powerful preemption provision; and the government's limited enforcement resources inevitably will prevent it from pursuing many valid claims.

Salomon asserts that whether providing a private cause of action would better promote a basic policy goal of ERISA is "legally irrelevant." Br. in Opp. 18. That is incorrect. Statutes should be construed, where the statutory language permits, to advance the basic policies sought to be promoted by a statutory scheme, and not to clash with them for no good reason. *See* Pet. 19 (citations omitted). Here, there can be no serious question that immunizing non-fiduciary parties in interest who engage in prohibited transactions from civil actions brought by ERISA plans, beneficiaries, fiduciaries, and the Department of Labor will undermine ERISA's basic policy of protecting plan assets and beneficiaries.[7]

4. Salomon's Arguments On The Merits Afford No Basis For Denying Review.

Finally, Salomon's extended argument on the merits (Br. in Opp. 18-28) affords no basis for denying review. Arguments on the merits, whether favoring the Seventh Circuit's position or the position adopted by every other circuit that has decided the issue, do not alter the fact that there is a square circuit conflict on an important question that calls for prompt resolution. If, as Salomon contends, the Seventh Circuit is correct on the merits, that is all the more reason to correct the law in the many other circuits that have reached a contrary conclusion. Any argument that certiorari

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[7] Salomon asserts (Br. in Opp. 17-18) that immunizing non-fiduciary parties in interest furthers the basic policies of ERISA, by ensuring that fiduciaries are held liable for all prohibited transactions. But immunizing non-fiduciary parties in interest greatly increases their economic incentives to engage in prohibited transactions. In many cases, moreover, plans and beneficiaries will not be able to recover the lost assets from another source.

should be denied because the Seventh Circuit's decision is correct on the merits is undercut by the brief of *amici* in support of the petition, who urge the Court to grant review because of the importance of the issue on which the circuits are split, even though they agree with the Seventh Circuit's decision on the merits. See *Amici* Br. 6-17.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

Susan R. Lichtenstein
Senior Vice President and
General Counsel
AMERITECH CORPORATION
225 West Randolph
Chicago, Illinois 60606
(312) 750-5200

Patricia J. Winter
Counsel
AMERITECH CORPORATION
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5556

Robert A. Long, Jr.
Counsel of Record
John M. Vine
Michael R. Bergmann
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Charles C. Jackson
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Counsel for Petitioners

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